A

Jaya bin Asahak v Munggau anak Lawai & Ors

B HIGH COURT (BINTULU) — SUIT NO 22–01 OF 2002 (BTU)
ABDUL AZIZ ABD RAHIM J
31 MARCH 2008

C *Civil Procedure — Locus standi — Declaratory relief — Action involved issues of customary rights over caves — Whether other beneficiaries had to be joined as parties — Whether suing in his own name or as legal representative for estate — Whether plaintiff had rights over caves*

D *Civil Procedure — Service — Writ of summons — Service by Pos Laju — Whether complied with O 10 r1(1) of the Rules of the High Court 1980 — Whether defendant prejudiced*

E *Civil Procedure — Striking out — Application for — Application to strike out Native Court at Tatau as party to suit — Whether issue already litigated — Whether issue estoppel applicable*

F *Native Law and Custom — Land dispute — Customary rights over land — Whether plaintiff had rights over caves — Whether licence to collect bird nests from caves sufficient to give plaintiff interest in caves*

G The plaintiff commenced this action seeking declaratory relief over the disputed caves ('the caves') which he claimed to have inherited from his late grandfather under the native customs of his community. Evidence adduced in the trial of the main suit in this case had shown that the plaintiff had a substantial interest in the caves in the form of a licence granted by the
H authorities to collect edible bird nests from the caves. This judgment involved the hearing of two applications. In the first application, the Native Court at Tatau (the seventh defendant) sought to strike out the amended writ and amended statement of claim (the writ) by firstly setting aside the service of the writ and then striking itself out as a defendant in the action. It was the
I seventh defendant's contention that the service of the writ did not comply with O 10 r 1(1) of the Rules of the High Court 1980 ('RHC'), in that, the service was by 'Pos Laju' instead of by personal service. It further submitted that service of the writ, without naming the specific native court to be served with the writ, was oppressive and an abuse of the court process and

prejudicial to the defendant. On the issue of striking out the seventh defendant as a party to the suit, it submitted that the Native Court at Tatau had no legal capacity or personality and could not be sued in a civil action. However, it was the plaintiff's contention that the joinder of the seventh defendant was only as nominal defendant and that including the seventh defendant as a party to the action was crucial in serving the interest of justice, so that the matter before the court would be properly and fully ventilated.

In the second application, the first to third defendants (the defendants) applied under O 18 r 19 of the RHC for an order to dismiss the plaintiff's claim against them and for the interim injunction order against them to be set aside with costs. The main ground for the application was that the plaintiff had no locus standi to commence and maintain this action against them. The defendants submitted that since the plaintiff's late grandfather had other beneficiaries and their children, the plaintiff could not institute these proceedings without joining the other beneficiaries and if the plaintiff claimed as representative of all the beneficiaries of his late grandfather, the plaintiff could only do so after he had obtained the letters of administration for all those beneficiaries who had died and named those who were still alive as plaintiff as well. The plaintiff maintained that his claim was based on his common law and customary rights to the caves.

Held, dismissing the defendants' application with costs:

(1) The second limb of O 10 r 1 of the RHC allows the writ to be served by way of prepaid AR registered post addressed to the seventh defendant. In this case the writ was served by way of Pos Laju, a specie of prepaid AR registered post operated by Pos Laju. Therefore there was compliance with O 10 r 1. In any event, the purpose of the service was to bring to the attention of the defendant the case against him and this was served by the service in this case and therefore the seventh defendant was not prejudiced (see para 8).

(2) The necessity to name the seventh defendant as a nominal defendant was obvious from the train of events that have led to this application by the plaintiff. The native court has had occasion to deal with the same issue that was before the court ie who had a better claim of ownership over the bird nest caves in question. Therefore, it was necessary to bring the decision of the native court on the issue before the court so that the whole matter of dispute as between the plaintiff and the first to third defendants could be resolved once and for all. Moreover, at the hearing of the plaintiff's application, an objection had been raised as to the seventh defendant being added as a party but that objection was overruled and there was no appeal against the decision. That issue that

had been decided after full argument could not now be relitigated because the principle of issue estoppels would apply (see paras 13–15).

(3) The fact that the plaintiff had been issued with a licence to collect bird nests from the caves showed that the plaintiff had a right over the caves and this right was sufficient to give the plaintiff an interest in the caves. Therefore applying the legal principles from the decided cases, the issue of locus standi in this case should be in the plaintiff's favour. Furthermore, the plaintiff in this case was not suing as legal representative for the estate for the rights over the caves, but was suing in his own name for a declaration that he had a better claim over the caves in accordance with the native customs of his community (see para 31).

[Bahasa Malaysia summary

Plaintif memulakan tindakan ini dengan memohon relief perisytiharan terhadap gua-gua yang dipertikaikan (gua-gua tersebut) yang mana didakwanya diwarisi daripada datuknya di bawah adat anak negeri masyarakatnya. Keterangan yang dikemukakan di dalam perbicaraan tindakan utama di dalam kes ini telah menunjukkan bahawa plaintif mempunyai kepentingan yang substansial ke atas gua-gua tersebut di dalam bentuk lesen yang diberikan oleh pihak berkuasa untuk mengutip sarang-sarang burung yang terdapat daripada gua-gua tersebut. Penghakiman ini membabitkan pendengaran dua permohonan. Di dalam permohonan pertama, Mahkamah Anak Negeri di Tatau (defendan ketujuh) memohon untuk membatalkan writ yang dipinda dan penyata tuntutan yang dipinda (writ tersebut) dengan, mula-mula mengenepikan penyerahan writ tersebut dan kemudian membatalkan dirinya sebagai defendan di dalam tindakan tersebut. Adalah hujahan defendan ketujuh bahawa penyerahan writ tidak mematuhi A 10 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), di mana penyerahan tersebut adalah melalui 'Pos Laju' dan bukan melalui penyerahan peribadi. Ia dihujahkan selanjutnya bahawa penyerahan writ tersebut, tanpa menamakan mahkamah anak negeri yang spesifik yang akan diserahkan dengan writ tersebut adalah menindas dan penyalahgunaan proses mahkamah dan memudaratkan defendan. Atas isu membatalkan defendan ketujuh sebagai pihak kepada tindakan, ia menghujahkan bahawa Mahkamah Anak Negeri di Tatau tidak mempunyai kapasiti undang-undang atau personaliti dan tidak boleh disaman di dalam tindakan sivil. Walau bagaimanapun, ia adalah hujahan plaintif bahawa percantuman defendan ketujuh sebagai pihak kepada tindakan adalah penting di dalam menjalankan kepentingan keadilan, oleh itu perkara di hadapan mahkamah akan disuarakan secara betul dan sepenuhnya.

Di dalam permohonan kedua, defendan pertama hingga ketiga (defendan-defendan) memohon di bawah A 18 k 19 KMT untuk perintah

menolak tuntutan plaintif terhadap mereka dan untuk perintah injunksi interim terhadap mereka diketepikan dengan kos. Alasan utama permohonan tersebut adalah bahawa plaintif tidak mempunyai locus standi untuk memulakan dan mengekalkan tindakan ini terhadap mereka. Defendan-defendan berhujah bahawa memandangkan datuk plaintif mempunyai benefisiari-benefisiari lain dan anak-anak mereka, plaintif tidak boleh memulakan prosiding ini tanpa menyertai benefisiari-benefisiari lain dan jika plaintif menuntut sebagai wakil kesemua benefisiari datuknya, plaintif hanya boleh berbuat demikian selepas dia memperolehi surat-surat pentadbiran untuk kesemua benefisiari yang meninggal dunia dan menamakan mereka yang masih hidup sebagai plaintif. Plaintif mengekalkan tuntutannya berdasarkan hak-hak *common law* dan adat terhadap gua-gua tersebut.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Bahagian kedua A 10 k 1 KMT membenarkan writ tersebut diserahkan melalui pos berdaftar AR berbayar dahulu, dialamatkan kepada defendan ketujuh. Di dalam kes ini, writ tersebut diserahkan melalui Pos Laju, sejenis pos berdaftar AR berbayar dahulu yang dikendalikan oleh Pos Laju. Oleh itu, terdapat kepatuhan dengan A 10 k 1. Walau bagaimanapun, tujuan penyerahan adalah untuk membawa perhatian defendan kepada kes terhadapnya dan ini ditunjukkan melalui penyerahan di dalam kes ini dan oleh itu defendan ketujuh tidak diprejudiskan (lihat perenggan 8).

(2) Keperluan untuk menamakan defendan ketujuh sebagai defendan nominal adalah jelas daripada rentetan peristiwa yang telah membawa kepada permohonan oleh plaintif. Mahkamah anak negeri telah beberapa kali berurusan dengan isu yang sama di hadapan mahkamah iaitu siapa yang mempunyai tuntutan pemilikan yang lebih baik terhadap gua-gua sarang-sarang burung yang dipersoalkan. Oleh itu, adalah perlu untuk mengemukakan keputusan mahkamah anak negeri ini di hadapan mahkamah supaya keseluruhan perkara yang dipertikaikan di antara plaintif dan defendan pertama hingga ke tiga boleh diselesaikan sekaligus. Selanjutnya, pada masa pendengaran permohonan plaintif, bantahan telah dibangkitkan terhadap defendan ketujuh yang dimasukkan sebagai salah satu pihak tetapi bantahan tersebut telah ditolak dan tidak terdapat rayuan terhadap keputusan tersebut. Isu tersebut yang telah diputuskan selepas penghujahan penuh sekarang tidak boleh dilitigasikan kerana prinsip isu estopel akan beraplikasi (lihat perenggan 13-15).

(3) Fakta bahawa plaintif telah diberikan lesen untuk mengutip sarang-sarang burung daripada gua-gua tersebut menunjukkan bahawa

plaintif mempunyai hak ke atas gua-gua tersebut dan hak ini mencukupi untuk memberikan plaintif kepentingan di dalam gua-gua tersebut. Oleh itu, menggunapakai prinsip undang-undang daripada kes-kes yang ditetapkan, isu locus standi di dalam kes ini patut memihak kepada plaintif. Selanjutnya, plaintif dalam kes ini bukan menyaman sebagai wakil undang-undang kepada estet untuk hak ke atas gua-gua tersebut, tetapi menyaman di atas namanya sendiri untuk perisytiharan bahawa dia mempunyai tuntutan yang lebih baik ke atas gua-gua tersebut mengikut adat anak negeri masyarakatnya (lihat perenggan 31).]

Notes

For a case on application for striking out, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6695

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 652–659

For cases on declaratory relief, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4702–4703

For cases on writ of summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6313–6320

Cases referred to

Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297 (refd)

B Surinder Singh Kanda v The Government of The Federation of Malaya [1962] 28 MLJ 169 (refd)

Deraman & Ors v Mek Yam [1977] 1 MLJ 52 (refd)

Federal Flour Mills Ltd v Owners of the Vessel 'Ta Tung' & Anor [1970] 2 MLJ 147 (refd)

Haji Laugan Tarki bin Mohd Nor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85 (refd)

James Lee Kiu Weh [Tawau High Court Criminal Miscellaneous Case No M/6 of 1962] (refd)

Ongkong Anak Salleh v David Panggau Sandin & Anor [1983] 1 MLJ 419 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)

Sugumar Balahishnan v Chief Minister of State of Sabah [1989] 1 MLJ 233 (refd)

Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)

Teh Guan Teik v IGP & Anor [1998] 3 MLJ 137 (refd)

Yap Kim Kee v Wong Heng Kit [2000] 3 MLJ 748 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 25(2), 35(1)

Kelantan Land Settlement Ordinance 1955 s 10(1)(a)

Native Courts Ordinance 1972

Native Courts Rules 1993 r 33(4)
Rules of the High Court 1980 O 10 r 1, O 10 r 1(1), O 15 r 16, O 18 r 19(d), O 35
Specific Relief Act 1950 ss 3, 41, 44(1)

Shankar Ram (Thomas Shankar Ram & Co) for the plaintiff.
Allan Lao (David Allan Sagah & Teng) for the first to third defendants.
Joseph Chioh (State Legal Officer, State Attorney General's Chambers' Sarawak) for the fifth and seventh defendants.

Abdul Aziz Abd Rahim J:

[1] Enclosure 323 is the seventh defendant's application to strike out the amended writ and amended statement of claim and encl 336 is the application by the first to third defendants for an order to dismiss the plaintiff's claim against them. I will deal with the two applications in that order.

ENCLOSURE 323

[2] At the commencement of the hearing of the application, Mr Joseph Chiok, the state legal officer who represents the seventh defendant orally applied to amend para (a) of the prayer in the application by amending the words 'amended statement of defence' to the words 'amended statement of claim'. I allowed the application.

[3] The application by the seventh defendant is two folds. Firstly, is to set aside the service of the writ and the amended statement of claim. Secondly, is to strike out the seventh defendant as a defendant in the action.

[4] With regard to the service of the writ and the amended statement of claim, the state legal officer submitted that the service does not comply with O 10 r 1(1) of the Rules of the High Court 1980 ('the RHC'). The rule says service must be by personal service; but in this instant the service was by 'Pos Laju'. He also submitted that the allegation that the cause papers were served and passed to one Encik Michael Rony is a hearsay and could not be substantiated. No evidence was disclosed in the plaintiff's affidavit that Mr Michael Rony was the registrar of the Native Court of Tatau.

[5] The amended writ of summons and the amended statement of claim were sent by 'Pos Laju' to Mahkamah Bumiputra Tatau. This is evident by exh KAR-3 in the plaintiff's affidavit in opposition affirmed by Karishma Shankar Asnani @ Sangeeta Lachu Topandasani on 7 November 2006. The covering letter that accompanied the service of the amended writ and the

amended statement of claim dated 6 September 2006 annexed to the affidavit of service by Zainuddin bin Hussaini affirmed on 27 October 2006 as exh ZH–A also show that the amended writ and the amended statement of claim was sent by 'Pos Laju' to Mahkamah Bumiputra Tatau. It is evident from the letter that it never specified the class of native courts intended to serve with the amended writ and amended statement of claim. Under the Schedule of the Native Courts Rules 1993, there are five classes of Native Court of Tatau at that time; and the registries for each class of the native courts is at the District Office of Tatau. Under r 33(4) of the Native Courts Rules 1993, there is registrar for each class of native courts. However I disagree with the submission by the learned state legal officer that without naming the specific native court to be served with the amended writ and statement of claim is oppressive and an abuse of the court process and prejudicial to the defendant. Firstly, at the hearing of encl 289 ie the plaintiff's application to add the seventh defendant as party, the state legal officer who acted for the seventh defendant then did not object that 'Mahkamah Bumiputra Tatau' or the 'Native Courts Tatau' was a wrong party. Secondly, exh 'A-J4' attached to the plaintiff's encl 289 clearly showed that the seventh defendant described itself as 'Mahkamah Bumiputra Tatau'.

[6] However the state legal officer, for the seventh defendant submitted that the service is bad for another reason. There is nothing to indicate who received the documents on 13 September 2006, the date on which the amended writ and the amended statement of claim were purportedly served on the seventh defendant. Exhibit ZH–A of Zainuddin's affidavit shows that the documents were received by Pejabat Daerah Tatau on 13 September 2006. But there is nothing to show by whom it was received. Though in exh KAR–1 and KAR–3 it was shown that the document was received by 'Chundi ak Jipon', there is nothing to indicate he was that person or from which Department of the Pejabat Daerah Tatau he was from. There is also discrepancy in the date the documents were purportedly received by the Pejabat Daerah Tatau. In exh ZH–A the date of receipt was stated as 13 September 2006; whereas in exh KAR-1 the date stated was 25 September 2006 and in exh KAR–3 the date of receipt was stated as 7 September 2006. There is no explanation or reason given for these discrepancies. So the question is on what date the documents was served and on which native court it was served.

[7] In the plaintiff's affidavit in opposition, the deponent asserted that Chundi ak Jipon was the Mahkamah Bumiputra's staff and Mr Mustaffa Kassim is alleged to be the assistant registrar of Mahkamah Bumiputra Tatau and Mr Michael Ronnie Langgong is said to be the pendaftar Mahkamah Bumitputra Tatau. It was submitted that these are bare assertions. There is no proof as to what these people are or what the plaintiff claimed them to be.

[8] Be that as it may, I think the service is a good service. The service was made on the Pejabat Daerah Tatau which also doubles up as the registry for Mahkamah Bumiputra Tatau. In its affidavit in opposition, the seventh defendant did not deny that Mr Mustaffa Kassim and Mr Michael Ronnie were working or attached to the Pejabat Daerah Tatau. In absence of such categorical denial I think it is reasonable to conclude that they were officers or staffs at Pejabat Daerah Tatau and most probably working for Mahkamah Bumiputra Tatau. It is also to be noted that O 10 r 1 of the RHC, is subject to the provisions of any written laws and Rules of the High Court; and in this regard, the second limb of the rule allows the writ to be served by way of prepaid AR registered post addressed to the seventh defendant. In this case the writ was served by way of Pos Laju, a specie of prepaid AR registered operated by Pos Malaysia. In my view therefore there is compliance with the Rule. In any event the seventh defendant is not prejudiced. The purpose of the service is to bring to the attention of the defendant the case against him; and this was achieved by the service in this instant case. In the circumstances therefore, the submission by the state legal officer on this ground fails.

[9] On the issue of striking out the seventh defendant as a party to the suit, the learned state legal officer submits that the native court at Tatau has no legal capacity or personality and cannot be sued in a civil action. He argues that there is nothing in the Native Courts Ordinance 1972 that stipulates that a native court can be sued or sued by that name. Furthermore, he says the High Court is not conferred with any supervisory and revisionary jurisdiction over a native court under s 35(1) of the Courts of Judicature Act 1964 ('the Act') and the additional powers conferred by s 25(2) and the Schedule to the Act over any person or authority could only be exercised in accordance with the provision of O 35 of the RHC.

[10] The native courts are creature of statute. They are established not by a federal law but by a State Ordinance viz the Native Courts Ordinance of Sarawak (Cap 43) with clearly defined jurisdiction and powers. Their jurisdiction and powers are limited. They are however inferior to the High Courts. Section 3 of the Act defines 'subordinate court' to mean any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court. But the phrase 'any court subordinate to the High Court' in s 44(1) of the Specific Relief Act 1950 is different from the expression of 'subordinate court' as defined in s 3 of the Act. Thus the native court cannot be said to be subordinate to the High Court unless the High Court exercises supervisory power over it. Moreover an appeal from a decision of the district native court does not lie to the High Court but to the resident native court: *Ongkong Anak Salleh v David Panggau Sandin & Anor* [1983] 1 MLJ 419. So how could the High Court have supervisory control over the native court?

[11] In *Haji Laugan Tarki bin Mohd Nor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 it was held that the High Court could grant order of certiorari over all inferior tribunals. Such prerogative order is supervisory in character. The *Haji Laugan Tarki*'s case confirmed another decision of the High Court in *Re James Lee Kui Weh* (Tawau High Court Criminal Miscellaneous Case No M/6 of 1962) on the same point.

[12] The plaintiff submits that the joinder of Mahkamah Bumiputra Tatau (Tatau Native Court) is only as nominal defendant; but it is crucial to serve the interest of justice so that the matter before the court would be properly and fully ventilated. The plaintiff had earlier vide encl 289 applied to the court to add Mahkamah Bumiputra Tatau as a party to the action and make it a nominal defendant. The application was heard by this court which granted the order. At the hearing of encl 289, Encik Zainuddin, the state legal officer who appeared for the fifth defendant and the Mahkamah Bumiputra Tatau did not object that Mahkamah Bumiputra Tatau was the wrong party to be added in the application and did not even file any affidavit in opposition. In fact it is a matter of record now that at the hearing of encl 289, Encik Zainuddin the state legal officer told the court that he (ie acting for the State Attorney Chambers) would end up representing and acting for the seventh defendant if the seventh defendant was to be made a party to the proceedings; and that that would not be necessary since the State Attorney General's Chambers already acting for the fifth defendant. Learned counsel for the plaintiff submits that such argument implies that there is no prejudice to the fifth defendant or any other defendant if the seventh defendant was added as a party.

[13] The necessity to name the Mahkamah Bumiputra Tatau as nominal defendant is obvious. In its decision exhibited as exhs P42 and P23T in the action, the native court was dealing with the same issue as the issue before this court ie who has a better claim of ownership over the bird nests caves in question. In its decision, the native court had ruled that the first to third defendants had a claim over the disputed caves. The case before the native court then involved the dispute over the same bird nest caves between the first to third defendants in this action and one Along Bangau. The said Along Bangau then filed an appeal against that decision to the Resident Native Court. However Along Bangau eventually withdrew the appeal. In his evidence before this court on 24 April 2006 in the course of the trial of this action, the plaintiff testified that he had filed his claim for the caves against the second defendant Temuli in the natives court. But the claim was dismissed. He then came to know about Along Bangau's claim over the caves against the second defendant and he was shocked. He wanted to intervene in that case but was disallowed by the native court. The plaintiff has filed an appeal against that decision and the appeal is still pending. Therefore in my

view it is necessary to bring the decision of the native court on the issue before this court so that the whole matter of dispute as between the plaintiff and the first to third defendants can be resolved once and for all. The court has the power and jurisdiction under the RHC to order any necessary party to add in for a final adjudication of a matter in dispute. This is to save time and costs and to avoid multiplicity of proceedings as well as to prevent injustice: *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 at p 55. And in *Federal Flour Mills Ltd v Owners of the Vessel 'Ta Tung' & Anor* [1970] 2 MLJ 147 it was said that *the court shall have the power to bring all the parties before it, and determine the rights of all in one proceeding.*

[14] In its amended statement of claim the plaintiff is seeking a declaratory order against the decision of the Native Court ie to declare the decision as null and void. This the court certainly can do; and if it does declare that the native court's decision is null and void, then it will bring the matter before the native court to an end. In *Sugumar Balahishnan v Chief Minister of State of Sabah* [1989] 1 MLJ 233, the Federal Court said at p 236 that 'under the existing law the court's discretion to make declaratory judgments cannot be fettered simply by the fact that in a particular case certiorari is also available remedy but not applied for by an applicant' (see also *Teh Guan Teik v IGP & Anor* [1998] 3 MLJ 137 (FC) at pp 148–150 and *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] MLJ 169 at p 173 (PC)). It has also been shown that in the case of *Haji Laugan Tarki* the High Court can exercise control over native courts through prerogative order.

[15] But most importantly is that at the hearing of the plaintiff's application in encl 289, the State Attorney General had raised its objection to Mahkamah Bumiputra Tatau being added as a party. But the objection was overruled. The decision to allow the plaintiff's application in encl 289 was made after hearing all arguments by counsel's including that of the state legal officer representing the State Attorney General. But the State Attorney General or the State Government never appeal against that decision. In my opinion, the fifth defendant cannot now be seen to relitigate the issue that had been decided after full argument. The principle of issue estoppel will apply. Therefore I think this application by the seventh defendant ought to be dismissed.

ENCLOSURE 336

[16] This is the first to third defendants' ['the defendants'] application under O 18 r 19(d) and the inherent jurisdiction of the court for an order that the plaintiff's claim against the defendants be dismissed and that the

A interim injunction order dated 8 December 2004 against the defendants be set aside with costs; and the costs of the whole action and this application be given to the defendants.

B **[17]** The main ground for the application is that the plaintiff has no locus standi to commence the action against the defendants on 10 January 2002. The plaintiff has by his new para 1.1 of the statement of claim admitted that he was only issued with the formal letters of administration of the estate of Bela bin Julai on 10 May 2004. The writ of summons in this case was filed on 10 January 2002 ie prior to the issuance of the letters of administration.
C

[18] Learned counsel for the defendants submits that the plaintiff by his own admission in his amended statement of claim of 4 September 2006 admitted that he was appointed as the administrator of the estate of Bila bin Julai on 10 May 2004. The suit was filed on 10 January 2002. Exhibit PI shows and the plaintiff himself testified that Bila bin Julai had eight beneficiaries namely Nuri bin Julai, Idris bin Rudang, Drahman bin Sunam, Dayang bente Lembu, Uddin bin Imun, Mani bin Kilong, Johari bin Sunam and Russam bin Umi. The plaintiff also have testified that most of these beneficiaries had passed away and left behind beneficiaries of the own estates. It was pointed out that for those beneficiaries of Bila bin Julai who had died, the plaintiff had not produced the letters of administration for the estate of those beneficiaries who had died appointing as administrator of their estate. Therefore it was argued that the plaintiff could not institute these proceedings without joining the other beneficiaries who are still alive as parties and if the plaintiff claims as representative of all the seven beneficiaries of Bila bin Julai, the plaintiff can only do so after he had obtained the letters of administration for all those beneficiaries who had died and named those who are still alive as plaintiff as well: *Yap Kim Kee v Wong Heng Kit* [2000] 3 MLJ 748.

[19] The plaintiff's submissions is that the plaintiff has locus standi to commence and maintain the action. This right it is argued is grounded on the plaintiff's inheritance as owner and heir to the estate of Bila bin Julai and on his customary and common law rights to the bird nest caves which are the subject matter of the present suit.

[20] As regard the letters of administration it was submitted that as evident by exhs P10, P10A, and P10B the letter of administration for the estate of Bila bin Julai was issued to Idris bin Rudang on 10 April 1978. However the letters of administration was later revoked vide Sarawak Government *Gazette* No 1223 with effect from 21 January 1986. This is evident by exh P49. In exh P49 Bela bin Julai and Johari bin Sunam were named as joint 'waris' of the estate of Julai.

[21] It was also submitted for the plaintiff that PW9 had tendered exh P62 which is the letters of administration of the estate of Bela bin Julai @ Bila bin Julai. The letter of administration (exh P62) was issued on 10 May 2004. He testified that the 13 caves were not included in exh P62 because they had been distributed earlier.

[22] It was further submitted that the evidence of PW9 is corroborated by exhs P13, P13A and P14 issued in 1994 as well as PW1's evidence and exhs PI prepared in 1995 after proper verification by native chiefs of the community. It was also submitted that exh P47 tendered by PW9 from his District Office's file shows clearly that the six caves listed which included 'Lubang Bukit Lumuf is certified by the District Officer of Bintulu on 31 May 1954 to be the sole property of Bila anak Mai.

[23] Learned counsel also pointed out that the learned senior state legal officer Mr Thomas Akin who appeared for the fourth and fifth defendants had not denied that the plaintiff had been issued with the licence to collect bird nests from the caves in dispute which give the plaintiff the right to collect bird nests from the caves and that is not disputed; what is denied is the plaintiff's claim of ownership over the caves. And PW6 testified that a licence would not be issued unless one has established the rights over the caves. Therefore it was submitted that the plaintiff has, by virtue of the issuance of licence to collect bird nests from the disputed caves previously, shown that he has rights over the caves.

[24] On the evidence adduced so far in this action, learned counsel for plaintiff submits that the plaintiff is indeed the rightful heir and grandson of Bela bin Mai (deceased) who derived his rights as heir, owner and licence holder of the 13 caves. Therefore the plaintiff can institute and maintain this action. The right to do so is based on the plaintiff's customary rights inherited from ancestors, common law rights or ownership rights. Thus the right of the plaintiff to bring the action is independent of the grant of the letters of administration in the form of exh P62.

[25] Another argument by the plaintiff on the locus standi is that the plaintiff is seeking a relief in declaration. The plaintiff contends that he is seeking declaration of his private rights over the caves. Citing the Federal Court's case of *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 where it was decided an interest to sue for something which a party considers himself entitled to is sufficient to give the party a declaration, learned counsel for the plaintiff submits that the plaintiff has the requisite locus standi and right to sue because the matter involves his private rights as heir of the caves inherited from his grandfather, Bila bin Julai and also by

virtue of licence to collect bird nests from the caves issued to him previously; a fact which is not denied by the fourth and fifth defendants.

[26] However in *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52, another Federal Court sitting at Kota Bahru decided that the only person who could have title to an estate after the death of the deceased would be the legal representatives of the estate. In that case the court finds no evidence of any legal representatives having been appointed; and therefore the appellants in that case have no right to bring an action under s 10(1)(a) of the Kelantan Land Settlement Ordinance 1955. In that case there was a land scheme enquiry and as a result the land in question was registered in the name of the defendant under a possessory title. The plaintiffs in that case were children of the original owner of the land; but they did not appeal against that enquiry decision. Instead they brought an action under the section claiming that they were entitled to a share in the land. In other words they were saying that they had an interest in the land. However the remedy sought in that case is not a declaration as in *Tan Sri Othman Saat*'s case, or the instant case under consideration.

[27] In *Tan Sri Haji Othman Saat*'s case, the respondent and 183 other persons had applied for land in Mersing, Johore but with no response for some eight years. Later the respondent learnt that the land had been alienated to a number of people including the appellant who was also, at the material times, the Menteri Besar of Johor. The respondent applied for declarations basically to impugn the validity of the alienation of the land. The appellant applied to have the application struck out, inter alia, on the ground that the respondent had no locus standi to sue. The appellant's application was dismissed by the High Court and the appellant appealed to the Federal Court on the issue of locus standi. In that case the court discussed the scope of the power to grant declaratory orders and judgments under s 41 of the Specific Relief Act 1950 and the O 15 r 16 of the RHC 1980. After reviewing the authorities, Abdoolcader J, who delivered the judgment of the court said, at p 178, as follows:

> On a general consideration of the authorities it would seem that the plaintiff in the proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit. This was the test propounded by Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] AC 438, at p 448.

[28] In the same case, the court also expressed its approval in liberalising the scope of individual standing in relation to injunctions and declarations when it said at p 179 as follows:

> It might not perhaps be inappropriate to make some observations on the locus standi rule in relation to injunctions and declarations. We refer to *Lim Cho Hock v Government of the State of Perak & 2 Ors* [1980] 2 MLJ 148 and accept and approve the discussions in the judgment in that case (at pp 149–151) on the question of locus standi and endorse the concept of liberalising the scope of individual standing.

[29] And then further down the judgment the following passage is found at the same page:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual right or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiffs interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not.

[30] In another Federal Court's case, *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297, the court had allowed the appellants, who were the beneficiaries of the deceased estate in that case, to commence and maintain an action against the respondent for declaratory relief for the protection and preservation of the estate's assets even the appellants had not first obtained the letters of administration for the estate. The court had made that decision after considering the respondent's arguments on the issue on locus standi of the appellant in that case.

[31] In our instant case, the plaintiff is also seeking declaratory relief over the disputed caves which he claims he inherited from his father and who in turn had inherited the caves from the plaintiff's grandfather under the natives' customs of the plaintiff's community. Furthermore evidence has been adduced in the trial of the main suit in this case which could show that the plaintiff has a substantial interest in the caves. To say the least, the plaintiff had been issued with licence by the authority to collect edible bird nests from the disputed caves; though the issuance of the license had been suspended because of the dispute. In my opinion, the fact that the plaintiff had been issued with such licence shows that the plaintiff had a right over the caves and this right is sufficient to give the plaintiff an interest in the caves. Therefore applying the principles laid down in the cases cited above I think the issue of locus standi in this case should be in the plaintiff's favour. Furthermore, the plaintiff in this instant is not suing as legal representative of the estate for the

rights over the caves; but the plaintiff is suing in his own name for a declaration that he has a better claim over the caves in accordance with the native customs of his community. Accordingly, I shall dismiss the defendants' application in encl 336 with costs to the plaintiff.

Application dismissed with costs.

Reported by K Nesan